

Filed for intro on 02/01/95
House Bill _____
By _____

Senate Bill No.SB0237
By Person, Jr.

AN ACT to amend Tennessee Code Annotated, Section 40-26-105 and Title 40, Chapter 30, to enact the "Post-Conviction Procedure Act".

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Title 40, Chapter 30, is amended by deleting the chapter in its entirety and by substituting instead the following:

40-30-101. **Short title.** - This chapter may be referred to as the "Post-Conviction Procedure Act".

40-30-102. **When prisoners may petition for post-conviction relief** - A prisoner in custody under sentence of a court of this state must petition for post-conviction relief under this chapter within three (3) years of the date of the final action of the highest state appellate court to which an appeal is taken or, if no appeal is taken, within three (3) years of the date on which the judgment became final. Consideration of a petition filed after such time shall be barred unless:

(a) The claim asserted in the petition is based upon a final ruling of an appellate court establishing a constitutional right that was not recognized as

existing at the time of the trial, if retrospective application of that right is required, in which case the petition must be filed within one (1) year of the finality of that ruling; or

(b) The claim asserted in the petition seeks relief from a sentence that was enhanced because of a previous conviction and the previous conviction has subsequently been held to be invalid, in which case the petition must be filed within one (1) year of the finality of that ruling.

40-30-103. **Preclusion of remedy.** - A petitioner will not be given relief under this chapter based upon any ground:

(a) That is pending or may still be raised on direct appeal under the Tennessee Rules of Appellate Procedure or by post-trial motion under Rule 29, or 33, of the Tennessee Rules of Criminal Procedure; or

(b) That was previously determined. A ground for relief is "previously determined" if a court of competent jurisdiction has ruled on the merits; or

(c) That was waived, that is, that the petitioner knowingly and understandingly failed to present for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented. There is a rebuttable presumption that a ground for relief not raised in any such proceeding which was held was waived.

40-30-104. **Successive petitions.** - This chapter contemplates the filing of only one (1) petition for post-conviction relief.

40-30-105. **Motion to reopen.** - The petitioner may file a motion in the trial court to reopen the post-conviction proceeding on the first petition if one (1) or more of the following circumstances apply:

(a) The motion is based upon a final ruling of an appellate court establishing a constitutional right that was not recognized as existing at the time

of the trial, if either state or federal law requires retrospective application of the right and this retrospectively applied right was not recognized at the time of filing the original petition for post- conviction relief;

(b) The motion seeks relief from an enhanced sentence that was based upon a previous conviction, and the previous conviction was held invalid after the filing of the original petition for post-conviction relief;

(c) A motion to reopen must be filed within one (1) year of the finality of the ruling establishing the constitutional right or the finality of the ruling that invalidates the previous conviction.

40-30-106. **Grounds for relief** - Relief under this chapter shall be granted when the conviction or sentence is void or voidable because of the abridgment in any way of any right guaranteed by the constitution of this state or the Constitution of the United States, including a right that was not recognized as existing at the time of the trial if either constitution requires retrospective application of that right.

40-30-107. **Filing of petition.** To begin proceedings under this chapter, the petitioner shall file a written petition with the clerk of the court where the conviction occurred naming the state of Tennessee as the respondent. No filing fee shall be charged.

40-30-108. **Amendment of petitions not in prescribed form.** - No petition for relief shall be dismissed for failure to follow the prescribed form or procedure until after the judge has given the petitioner reasonable opportunity, with the aid of counsel, to file an amended petition.

40-30-109. **Petitions for habeas corpus may be treated as petitions under this chapter.** - A petition for habeas corpus may be treated as a petition under this chapter when the relief and procedure authorized by this chapter appear adequate and

appropriate, notwithstanding anything to the contrary in Tennessee Code Annotated, Title 29, Chapter 21, or any other statute.

40-30-110. **Preliminary consideration.**

(a) The trial judge to whom the case is assigned shall within thirty (30) days of the filing of the original petition, or a petition amended in accordance with subsection (d) of this section, examine it together with all the files, records, transcripts, and correspondence relating to the judgment under attack and enter an order in accordance with the provisions of this section or § 40-30-111.

(b) If it plainly appears from the face of the petition, any annexed exhibits or the prior proceedings in the case that the petition was not filed in the court of conviction or within the time set forth in the statute of limitation, the judge shall enter an order dismissing the petition.

(c) If it appears that a post-conviction petition challenging the same conviction is already pending in either the trial court, Court of Criminal Appeals, or Supreme Court, the judge shall enter an order dismissing the subsequent petition.

(d) If the petition is technically deficient, incomplete, or incomprehensible, the court shall note the specific deficiency or omission and shall enter an order stating that the petitioner must file an amended petition containing the required information within fifteen (15) days or the petition will be dismissed. The amended petition shall be examined by the judge to whom it is assigned for preliminary consideration under this section.

(e) If a petition amended in accordance with subsection (d) of this section is still inadequate, the court shall determine whether the petitioner is indigent and in need of counsel. The court may appoint counsel and enter a preliminary order if necessary to secure the filing of a complete petition.

(f) Upon receipt of a petition in proper form, or upon receipt of a petition amended in accordance with subsection (d) of this section, the court shall examine the allegations of fact in the petition. If the facts alleged, taken as true, fail to show that the petitioner is entitled to relief or fail to show that the claims for relief have not been waived or previously determined, the petition shall be dismissed.

40-30-111. **Preliminary order.** - (a) If the petition is not dismissed upon preliminary consideration, the court shall enter a preliminary order.

(b) In all cases, the preliminary order shall direct the following:

(1) If a petitioner not represented by counsel requests counsel and the court is satisfied that the petitioner is indigent as defined in § 40-14-201, the court shall appoint counsel to represent the petitioner.

(2) If counsel is appointed, counsel must file an amended petition or a written notice that no amendment will be filed within thirty (30) days, unless extended for good cause. The written notice shall state that counsel has consulted the petitioner and that the petitioner agrees that there is no need to amend the petition.

40-30-112. **District attorney general shall represent state.** - (a) The district attorney general shall represent the state and respond by proper pleading on behalf of the state within thirty (30) days after receiving notice of the filing of the amended petition or notice that no amendment will be filed, unless extended for good cause. Good cause will not be met by a routine statement that the press of other business prevents a response within the thirty (30) day period.

(b) If the petition does not include the records or transcripts, or parts of records or transcripts that are material to the questions raised therein, the district attorney general is empowered to obtain them at the expense of the state

and shall file them with the responsive pleading or within a reasonable time thereafter.

(c) The district attorney general shall be reimbursed for any expenses including travel incurred in connection with the preparation and trial of any proceeding under this chapter. This expense shall be paid by the state of Tennessee, and shall not be included in the expense allowance now received by the various district attorneys general.

(d) (1) It is the duty and function of the attorney general and reporter, and his staff, to lend whatever assistance may be necessary to the district attorney general in the trial and disposition of such cases.

(2) In the event an appeal is taken or a delayed appeal in the nature of a writ of error is granted, the attorney general and reporter, and his staff, shall represent the state and prepare and file all necessary briefs in the same manner as now performed in connection with criminal appeals.

40-30-113. **Prehearing procedure.** - (a) The court shall review the case after the district attorney general's response is filed. If, on reviewing the petition, the response, files, and records, the court determines conclusively that the petitioner is entitled to no relief, the court shall dismiss the petition. If the court determines that an evidentiary hearing is needed, the judge shall enter a scheduling order setting one within four (4) calendar months of the state's response.

(b) Discovery pursuant to Rules 16 and 17(c), Tennessee Rules of Criminal Procedure, and pursuant to Rule 30, Tennessee Rules of Civil Procedure, shall be available subject to the approval of the trial judge.

40-30-114. **Scope of hearings.** -The scope of the hearing shall extend to all grounds the petitioner may have, except those grounds which the court finds should be

excluded because they have been waived or previously determined, as defined in T.C.A. § 40-30-103 (b) and (c).

40-30-115. **Final disposition of petitions.** - (a) If the court finds that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable, the court shall vacate and set aside the judgment or order a delayed appeal as appropriate and shall enter an appropriate order and any supplementary orders that may be necessary and proper. Costs shall be taxed as in criminal cases.

(b) The court shall rule within sixty (60) days of the conclusion of the proof. If the court finds in favor of the petitioner, it shall enter an appropriate order consistent with subsection (a) of this section.

(c) In capital cases, final disposition shall be made within one (1) year of the filing of the petition. Such deadline may be extended only by order of the trial court based upon a finding that unforeseeable circumstances render a continuance a manifest necessity.

40-30-116. **Enforcement of trial court's duty.** - If the court fails to comply with the time requirement imposed in Tennessee Code Annotated, § 40-30-115(c), any party may file a motion to enforce compliance with the Supreme Court, setting out the facts said to constitute a failure to comply with the duties set out in this section. The party shall serve a copy of the motion upon the trial court by mailing a copy to the trial court clerk. The trial court and any opposing party may file and serve a written response upon the Supreme Court and the parties within seven (7) days of service by the moving party. If the Supreme Court finds that the provisions have not been complied with, it shall enter an order setting a reasonable time within which the trial court must finally dispose of the petition. The Supreme Court, or a single justice thereof, shall act upon such motion within fourteen (14) days from the date of the filing of the motion.

40-30-117. **Determination of indigency - Appointment of counsel and court reporters.** - Indigency shall be determined and counsel and court reporters appointed and reimbursed as now provided for criminal and habeas corpus cases by chapter 14, parts 2 and 3 of this title.

40-30-118. **Promulgation of rules.** - (a) The supreme court may promulgate rules consistent with this chapter, including, but not limited to, rules prescribing the form and contents of the petition, the preparation and filing of the record and assignments of error for simple appeal and for delayed appeal in the nature of a writ of error and may make petition forms available for use by petitioners.

40-30-119. **Bail during new trial or delayed appeal - Exception.** - When a new trial or delayed appeal is granted, release on bail shall be discretionary with the trial judge pending further proceedings. In all other cases the petitioner shall not be entitled to bail.

SECTION 2. This act shall take effect upon becoming a law, the public welfare requiring it and shall apply to any petitions filed on or after that date.

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